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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-167

UNITED STATES OF AMERICA,

Petitioner,

v.

CHARLES W. RAMSEY and
JAMES W. Kelly,

Respondents.

OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINION BELOW

The opinion of the court of appeals is not yet reported and appears at App. A. pp. 1a-20a of the Petition.

JURISDICTION

Jurisdiction of this Court is properly invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether customs officials in exclusive custody and control of the international equivalent of domestic first class letter mail matter, may invade the privacy thereof, upon suspicion that drugs were "possibly" contained therein, without first obtaining a search warrant.

CONSTITUTIONAL PROVISION STATUTES AND REGULATIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

19 U.S.C. 482, 19 U.S.C. 1582, and the pertinent portions of 19 C.F.R. Part 145 and 39 C.F.R. Part 61 are set out in App. C. pp. 22a-27a of the Petition.

STATEMENT

Charles W. Ramsey and James W. Kelly were long-time friends who, the record reflects, pooled their resources to commence a heroin-by-mail enterprise in the Washington, D.C. area. Essentially, letters containing nearly pure heroin were mailed from Bangkok, Thailand to various locations for distribution.

On January 29, 1974, Bailey and Ward, their suppliers, registered at a hotel in Bangkok and the Thai

authorities were alerted to their arrival by German agents. Twenty-four hour surveillance was then placed on them. During that surveillance, Ward was observed to place letter-size envelopes in six different mail boxes. Five of these envelopes were seized from the mailboxes and among the various addresses thereon was one destined for a Ramsey-Kelly local mail drop. On February 2, 1974, police officers entered Bailey and Ward's hotel room, arrested them, and seized all of the ingredients of their heroin-by-mail operation. Eleven of the sealed heroin filled envelopes seized at that time had Washington, D.C. area addresses which were later tied in to Ramsey and Kelly. On February 4, 1974, the Drug Enforcement Administration in Washington received a cable concerning the recent Thai developments including the arrests of Bailey and Ward.

On that same date and, independent of the knowledge of what had previously transpired, New York based Customs Officer George Kallnischkies routinely seized and opened eight heroin laden envelopes addressed to four D.C. area locations. These envelopes had been mailed by Bailey and Ward in Thailand for eventual delivery to Ramsey and Kelly. The eight envelopes were then placed in a locked container and sent from New York City to Washington, D.C.

As a result of this seizure in New York, Drug Agents here alerted a Postal Inspector on February 5, 1974, of the complete description of the eight envelopes seized and those seized in Bangkok, Thailand. On February 7, 1974, the Postal Inspector notified one of the Drug Agents that three similar envelopes had been intercepted and detained at the Main United States Post Office in Washington, D.C. That same day Agents

Landrum and Atlee obtained a United States Magistrate's Search Warrant for these three envelopes. The envelopes were seized and subsequently determined to contain nearly pure heroin.

On February 12, 1974, the eight letters seized and searched in New York arrived in their locked container and were recovered by Postal Inspector Hall. Then, for the first time, Agents Landrum and Atlee obtained a search warrant for these eight envelopes. On February 14, 1974, six of the eight envelopes were delivered to three addresses contained thereon – two to each location. The two remaining ones were not delivered because of an error in addressing them by Sylvia Bailey to a non-existent address in Washington. James Kelly was then observed on February 14, 1974, in the company of two women, making his rounds to the three surveilled locations and to recover six envelopes which he placed in a brown paper bag. At approximately 1:15 p.m. Kelly drove to the unit block of S Street, N.E. between North Capitol Street and Lincoln Road, parked his car, and walked to 13 S Street, N.E., where Charles W. Ramsey resided. At about the same time, Ramsey was observed to drive slowly past Kelly's car, circle the block and park about a car length in front of Kelly's car. Kelly walked to the driver's side of Ramsey's car and gave the latter the brown paper bag containing the six letters. Agents moved in quickly and made their arrests.

George Kallnischkies (hereafter referred to as Mr. K), testified that he was employed by the United States Custom Service and worked Region 2, New York City. His main responsibility was to examine incoming foreign mail, letter class mail, to see if it contained any dutiable merchandise or contraband. The usual procedure was for the mail in question to come into

Kennedy airport and from there be routed to the various post offices; in the instant case the mail was delivered to the General Post Office.

On Monday, February 4, 1974, Mr. K was working and had occasion to "inspect" letter class mail that had entered this country from other countries. Prior to February 4, 1974, the witness remembered that heroin had been seized from mail coming in from Thailand. Mr. K observed the eight letters which raised his suspicions. He weighed one of the envelopes and found it to weigh 42 grams which he considered rather heavy for an airmail envelope. It also felt as if something was inside of the envelope, not merely plain paper. Accordingly, he opened the envelope via his normal procedure:

> "I usually have a very primitive tool, an ice pick and I just peal (*sic*) the flap open very carefully and remove the contents and examine them . . . ."

Upon opening one of the envelopes herein, he found two pieces of cardboard, and between them, a plastic bag containing heroin. The seven other envelopes appeared similar to him and Mr. K proceeded to open those also and discover heroin in each of them.

The witness stated that no search warrant had been obtained to open the mail in question which he described as airmail letter type envelopes. At the time Mr. K opened the envelopes, he had no prior information about this case nor had he previously noticed the addresses typed on the envelopes for delivery in this country. These particular articles of airmail, had they been mailed within this country would have been considered the equivalent of first class mail.

"Q Now, on the face of each one of these envelopes, did they appear to be so-called letter mail, as you looked at the envelope?

A Yes, sir, these are letters. . . ."

It is clear that the first intrusion into this mail occurred at 1:30 p.m. on Monday, February 4, 1974, and that the items searched could not have arrived at the post office that same day. These eight letter type envelopes arrived at the post office from the airport at the latest on Sunday and at the earliest on Saturday. They were kept there for inspection over the weekend because the customs people did not work on weekends although the post office personnel did. Because of several prior heroin mailings from Thailand, Mr. K was generally suspicious of all mail coming in from that country which probably ranged between "200 or 500 envelopes from" there. On occasions mail would be opened which turned out to contain innocuous material. The particular envelope in question raised a suspicion in his mind:

"Q In other words is it fair to categorize this as intuition or intuitive?

A Yes, sir."

"You know, if you wanted me to be specific, based on my experience, I would say this is Thailand and possibly heroin."

In the course of his daily activities the witness indicated that he probably opened several hundred pieces of mail per day coming in from Thailand and South American countries. The witness could not state with any degree of exactitude what percentage of the mail opened did not contain contraband other than to say, "it does happen, yes."

The cases proceeded to non-jury trial upon the basis of a stipulated record below after various motions raised by the defense were denied by the district court. Upon prior agreement of counsel and the court, twelve of the seventeen drug related counts against Mr. Ramsey in Crim. No. 74-623 were severed and he was adjudged guilty on counts one, two, fourteen, fifteen and seventeen. On February 14, 1975, he was sentenced to concurrent terms of imprisonment for these offenses, the longest of which was 10 to 30 years.

In Crim. No. 74-624 he was adjudged guilty of two firearm's offenses and received lesser terms.[1]

A divided panel of the court of appeals reversed. Judges McGowan and Tamm held that before international letter mail may be opened, a showing of probable cause be made to and a warrant secured from a neutral magistrate. The majority, while recognizing that Postal Regulations include within the term *international letter class mail* items that would clearly be packages, was careful to delimit its definition of the term, for warrant purposes, to that mail matter which common sense tells us are letters. (Petition App. A 9a-10a, n.6) The majority opinion gives full recognition to the border search exception to the warrant procedure when dealing with packages moving through international mail. (Petition App. A. 5a-6a) Judge Robb dissenting, thought that the border search exception extended to sealed envelopes moving in such mail, as had two other Circuit Courts of Appeal that had considered the question.

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[1] These weapons offenses were, concededly, the fruit of the narcotic arrest and these convictions stand or fall with the heroin offenses. Cf. Petition p. 5 n. 6.

REASONS FOR DENYING THE PETITION

In the opening round of its reasons advanced to grant the instant petition, the government raises the spectre that the ruling below may apply to mail entering this country in containers weighing as much as 60 pounds and accordingly, surmises that smuggling will soon run rampant. Petition p. 7 and n. 5. It becomes more certain as the Petition progresses. Petition pp. 11-12. Perhaps this expansive reading of the opinion below is itself cogent reason to deny the relief sought, and await the manner in which that opinion is treated by other courts considering the issue. As we see it, the majority took great pains to indicate that its ruling solely applied to *letters* or *letter-sized* envelopes and not to what one would call a package – viewing the distinction between the two from a common sense angle of vision. In so limiting its rationale, the majority specifically sought to minimize the impact on border searches by confining the search warrant requirement to letters that look like letters and nothing more. Thus, in considering the instant Petition, the Court should view the ruling below as only applying to and seeking to limit unwarranted intrusions into international letter class mail which objectively appears to seek the aegis of the right to privacy.

If that is not readily apparent, then the Court should await future rulings to see whether or not the instant case is – as we contend – to be narrowly construed. In addition to the opinion below being self-limiting, we are not unmindful of the fact that the court had particular envelopes in mind, which were photographed in color and which formed part of the record on appeal. The court alluded to this at n.6 of its slip opinion wherein

it described those envelopes and concluded, that "Government Exhs. 35-40 were in size and appearance closer to the letter end of the spectrum and fell outside of the border search exception." Petition App. A 9a.

To our knowledge, the government has not provided this Court with those exhibits in order that it may be fully informed as to the precise factual matrix presented to the court of appeals. Being fully apprised of these specifics, we cannot take seriously the suggestion in the Petition that the judgment below mandates search warrants based upon probable cause before customs officials may inspect "[b]ulky envelopes and packages arriving from abroad." Petition at 11. From this we are presented with the further bootstrap argument that smuggling will now be both profitable and protected. We submit that, upon careful analysis, the opinion will spawn no such enclave for smugglers.

If Petitioner is in error, and the issue is more narrowly drawn, then we are left with a case that seeks an answer to the question whether this Court, at this point in history, is willing to permit petty government officials armed with ice picks, as was Mr. Kallnischkies, to open the international equivalent of domestic first class letter mail entering this country – without a warrant and upon their suspicions alone. If not, the judgment below should stand and the Petition denied.

Let us make no mistake about the fact that the government is contending for nothing less than the absolute constitutional right to open private letters arriving in this country without a warrant, at random, and without suspicion to believe that they contain contraband or dutiable materials. Petition at pp. 11-12. For that reason, the instant case is unique in that it

does not concern the Fourth Amendment in but its theoretical application to ordinary citizens, but indeed, conjures up that point in history when the populace at large had legitimate fears concerning intrusions into their privacy at the discretion of the crown's messengers.[2]

The government herein contends that at its whim and caprice it can inspect, *inter alia*, the following incoming international mail:

Private correspondence from every American citizen traveling outside of the country who may be writing home, to their jobs, to their doctors, to their lawyers or, to judges – to whom they may be related. Further oppressive examples are legion. Notwithstanding this, the government seeks to console us with the thought that once this correspondence is opened, the customs official is not supposed to read what he finds without first obtaining a warrant. Petition at p. 14. The court of appeals was also aware of this regulation which, it noted, had "no sanction" accompanying it. Slip. op. 12 n. 9. Petition App. A 14a.

In any event, as we see it, the border search exception to the warrant requirement is historically inapposite to the situation at hand.

This Court, over six years ago, allowed a 29 hour detention of first class mail during which time a search warrant could be procured for a seizure. *United States v. Van Leeuwen*, 397 U.S. 249 (1970) The definition of border search sought by the government is not as broad as it may appear at first blush as we read *Carroll v. United States*, 267 U.S. 132 (1925), and other recent cases. *Carroll* sustained the probable cause search of a car without a warrant under the National Prohibition

[2] Recognizing these realities, the government petitioned this Court straightaway without first seeking rehearing *en banc* below.

Act, because of reasonableness. In reflecting upon such searches the Court alluded, *inter alia*, to the progenitor of 19 U.S.C. §482 which:

> "[M]ade lawful for customs officers not only to board and search vessels within their own and adjoining districts, but also to stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandize which was subject to duty or had been introduced into the United States in any manner contrary to law. . . .". *Carroll*, supra at 151. The Court alluded to this statute and similar ones –
>
> "To show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." at 153.

The Court also noted that all travellers may be stopped while crossing international boundaries because of national self-protection, "[b]ut those lawfully within the country, entitled to use the public highways, have a right of free passage without interruption of search unless" there is probable cause to believe they are in violation of the law.

The present Border Search authorizing statute is 19 U.S.C., §482. It provides for searches of any "vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in

any manner contrary to law." It also provides for customs agents "to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law." The term "wherever found" however, is as we shall see, quite limited in scope.

It is critical to note that the foundation Border Search statute considered in *Carroll v. United States, supra., i.e.,* 3 Stat. 231, 232, March 3, 1815, distinguished between an ambulatory and permanent situation.

> "And if any of the said officers of the customs shall suspect that any goods, wares, or merchandise, which are subject to duty, or shall have been introduced contrary to law, are concealed in any particular dwelling, store or other building, he shall, upon proper application, on oath, to any judge or justice of the peace, be entitled to a warrant . . . Provided always, that the necessity of a search warrant, arising under this act, shall in no case be considered as applicable to any carriage, wagon, sleigh, vessel, boat, or other vehicle, of whatever form or construction, employed as a medium of transportation, *or to packages on any animal or animals or carried by man on foot."*

It was this original statute the Court alluded to in *Carroll,* supra., when it observed that neither this section "nor any of its earlier counterparts has ever been attacked as unconstitutional." 267 U.S. at 152. 13 Stat. 441, 442, February 28, 1865, which again allowed for the so-called Border Search, provided for the stopping and searching of persons or vehicles *in transit.*

For non-moving situations the statute provided:

> "That in case any store, warehouse, or other building shall be upon or near the boundary line between the United States and any foreign country, and there is reason to believe that [items are placed there in violation of law], and the collector . . . or surveyor of customs, shall make oath before any magistrate . . . , that he has reason to believe, and does believe, that such offence has been therein committed, such officer shall have the right to search such building. . . "

14 Stat. 178 July 18, 1866, for the first time specifically allowed customs officers to search any "trunk or envelope". But it is clear from a reading thereof, that such searches without warrant only applied to trunks or envelopes "on board" vessels or upon vehicles, beasts or persons. The present statute 19 U.S.C., §482 is but an abbreviated form of its predecessors, and from an historical perspective, does not permit for the opening of international mail when there is no danger of that mail moving before a warrant can be obtained. *Cf., United States v. Van Leeuwen,* supra.

Time and time again the key to the validity *vel non* of a particular search is "reasonableness", vis-a-vis the fact that the warrant procedure is the judicially preferred route.

In *United States v. Beckly,* 335 F.2d 86 (6th Circuit 1964) marihuana arrived into this country in a package weighing between 9 and 10 pounds. It was stated to contain wall matts, pillow cases and robes of a total value of $23.00. A customs agent opened the package without warrant and the Court sustained introduction of the evidence at trial. As its first ground the Court relied on the fact that only first class mail is subject to the warrant procedure and here "first class postage was not paid on the package." 335 F.2d at 88. The Court also fashioned a policy that:

> "Fourth Amendment standards applicable to mail matter moving entirely within the country are not applicable to mail matter coming in from outside the country at least where a customs determination must be made. There seem to be no adjudicated cases dealing with the necessity of probable cause and search warrants for inspection of imports by mail, but there are many cases holding or indicating that such is not required generally for searches by custom agents at the borders of the country." Accord, *United States v. Odland*, 502 F.2d 148 (7th Cir. 1974). *United States v. Barclift*, 514 F.2d 1073 (9th Cir. 1975).

These decisions used a shotgun border search approach and extrapolated it to non-moving situations, without analyzing the difference between a true border search and mail matter already within the control of the postal authorities and for which time to obtain a warrant is present. *United States v. Sohnen*, 298 F. Supp. 51 (E.D. N.Y. 1969) sustained a search of an international package without a warrant relying on the *Beckly*, rationale. However, the Court in Sohnen added a caveat:

> "The Constitution at least prevents harsh and demeaning searches on mere suspicion and it may well prevent the opening of letters, as opposed to packages containing merchandise, without a search warrant."

Sohnen, concerned a sealed package containing twelve gold coins which

> "did not bear a required label stating that it could be opened for customs inspection.
>
> * * * *
>
> The situation here is analogous to the inspection of inbound commercial shipments."

United States v. Swede, 326 F. Supp. 533 (S.D.N.Y. 1971), also upheld the opening of first class type mail from Switzerland without a search warrant. In ruling, however, the Court determined that the envelope was a "package" and thus, "we do not determine whether the Constitution prevents the opening of letters, as opposed to packages containing merchandise without a search warrant." However, if a letter is initially involved, a search cannot retroactively transform it into a package because "a search is not to be made legal by what it turns up." *United States v. DiRe*, 332 U.S. 581, 595 (1948).

Recently, lower federal courts have obviously been aware of the havoc that a blanket border search approach to first class international mail would entail, and have accordingly, been narrowing their decisions to exclude letters, as the Court did in *United States v. Swede, supra.* In *United States v. Doe*, 472 F.2d 982 (2d Cir. 1973), for example, the Court upheld the search of a large package from Colombia, South America labelled "old clothing."

> "While this court has never expressly so held, there is a substantial body of precedent that would apply the same border search standards to mail coming into the country, *especially where, as here, there is a representation on the package that it contains merchandise.*" 472 F.2d at 984.

In *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966) the Court invalidated the search of a domestic first class parcel containing smuggled watches without a warrant. The government, in part, relied on 19 U.S.C. §482. The Court noted that this was not a broder search and, in any event, concluded that:

"We need not examine the statute's precise meaning, for appellant's attack upon the search of his package is based solely on constitutional grounds and, however it is to be read, the statute could not effectively authorize a search which the constitution prohibited." 367 F.2d at 3.

Cf. Ex Parte Jackson, 96 U.S. 727, 733 (1877).

"No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution."

"It can hardly be contended that the sender or the addressee had a reasonable expectation of privacy with regard to a large package mailed from a foreign country, which is represented to contain non-dutiable merchandise. Cf. *Katz v. United States,* 389 U.S. 357. . . ". 472 F.2d 985.

Conversely, as to letter type envelopes, such expectation of privacy would be reasonable and accordingly, subject to the Fourth Amendment on the rationale of *Katz.*

In *United States v. Various Articles of Obscene Mer.,* 363 F. Supp. 165 (S.D.N.Y. 1973), the Court noted that "the constraints placed on government intrusion into persons and their papers by the Fourth Amendment do apply to Customs searches." at 167. Judge Duffy also observed that: "Some courts have hinted that the standards may be different when dealing with a letter-sized envelope than when it is a package with merchandise which is at issue."

This distinction between letters and packages is, no doubt, due in large part to subjective appraisals of

privacy. While all of us have a general notion that large packages can be inspected by postal employees, we strongly believe that our letters and small sealed envelope type of correspondence is beyond postal scrutiny. We abhor notions of censorship such as that practiced in totalitarian countries or prisons. *Cf. Stroud v. United States,* 251 U.S. 15, 21 (1919). (No expectation of privacy for letters mailed by inmate at Leavenworth penitentiary.) Accordingly, there is a firmly grounded reasonable expectation that this envelope type of mail is secure from intrusion. As a result thereof, only the warrant procedure of the Fourth Amendment could effect a lawful seizure. *Katz v. United States* 389 U.S. 347 (1967).

We thus conclude – for the purposes of this case – that international letter type mail coming into this country which is functionally equivalent to domestic first class mail is not subject to governmental intrusion without a search warrant, unless that mail is upon a person or his luggage entering the country. We believe this to be the proper historical angle of vision from which to read 19 U.S.C. §482. The so-called border search concept is an offshoot of the *necessity* to act quickly to preserve our territory and customs duties at a time when an individual and/or his belongings entering the country could rapidly disappear. No such justification exists herein, when the mail was in the custody and control of the postal authorities and the agents had ample time to apply for a search warrant.

To reiterate, this view is strongly supported by *Katz v. United States, supra,* which greatly changed notions of privacy under the Fourth Amendment. When any of us cross international boundaries we expect and readily submit to customs inspections of our persons and

belongings – a cognizable consequence of such travel. When we write to people in foreign lands we expect an answer and, vice versa, because letters are, of necessity, unilateral documents requiring further correspondence as a rule. It is unreasonable to assume in this shrinking world that the law only protects one side of this flow of communication from unreasonable searches and seizures. It is untenable to think otherwise than that all parties to the communication process, especially those receiving letters in America, have a reasonable expectation of privacy as to their mail. *Cf.* 18 U.S.C. §1702.

Finally, as a reason for the granting of its petition, the government points to an undesirable "conflict among the circuits" which was engendered by the opinion below. Petition p. 9. While such a conflict appears to exist, it may well be that re-examination of the issue by the various Courts of Appeal will bring us the harmony sought by the government. If, as we contend, the opinion below was correct, other courts could realign their thinking in the matter upon consideration of that opinion. Furthermore, at page 9, n. 9 of its Petition, the government has given us some extra-record insight into an ongoing administrative procedure which might obviate the problem it sees. We are advised that the Postal Service has notified the Customs Service that it will not turn over for customs inspection mail bound for the District of Columbia unless the Bureau complies with the procedures required by the court below.

We are further informed that the government has been informed by the Customs Service that it cannot meet these procedures with the current level of personnel. However, hope for the future is not ruled out, because we are also told that compliance would be

impractical even with an expanded staff. While, in our experience, nothing takes the place of live testimony subject to rigorous examination to develop a precise factual record, taken at its obscure best, we can infer from this extra-record material, that compliance will be achieved in the future – albeit with some difficulty. We have great confidence that the government will not let this mail matter slip through its hands for long without some sort of monitoring system which will comply with the ruling below.[3] Therefore, compliance at the administrative level may soon forestall the need for further review by this Court. At the very least, we suggest that the Court await the outcome of further administrative proceedings to be more fully explored in future cases upon an adequate record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[3] Judges McGowan and Tamm – quite concerned with the problem of smuggling – were particularly careful to articulate how the Customs Service could readily comply with the search warrant requirement as applied to that limited class of mail matter with which the opinion dealt. Cf. Petition App. A, 8a-10a.